



The Comptroller General
of the United States

Washington, D.C. 20548

Ahearn

Decision

Matter of: Kahn Industries, Inc.
File: B-225491; B-225533
Date: March 26, 1987

DIGEST

1. The Army may properly specify a sole source for items being purchased to implement a foreign military sale where the foreign government has provided written directions to do so by executing Department of Defense Form 1513, "Letter of Offer and Acceptance," or through an amendment or modification to the form.
2. A sole-source procurement to implement a foreign military sale is not improper because the procuring agency recommended or advised the foreign government that a particular item would meet its needs where there is no evidence that the agency recommended a particular source in bad faith or for the purpose of avoiding competition and where ultimately the foreign government provided written directions for the item, since agency may suggest to foreign government what item(s) will meet requirements.
3. Agency is not required to publish notice before award of two proposed sole-source procurements on behalf of foreign military sale customers in the Commerce Business Daily, since the law provides an exemption from the requirement where written directions of the foreign customers have the effect of requiring sole-source procurements.

DECISION

Kahn Industries, Inc. protests the propriety of two sole-source awards to Go-Power Corporation (contract nos. DAAA09-87-C-0028 and DAAA09-87-C-0043) made by the Department of the Army. The contracts are for dynamometers to be used in the testing, repair, and overhaul of vehicle engines. The Army purchased the dynamometers on behalf of the Republic of the Philippines and the Arab Republic of Egypt, which will reimburse the United States for the cost of the items. Kahn primarily complains that the Army did not have the written directions of the foreign governments necessary to justify

its failure to obtain full and open competition in the procurements. The protester also complains of the Army's failure to announce either procurement action in the Commerce Business Daily before award.

We deny the protests.

Both procurements involve foreign military sales (FMS) conducted under the Arms Export Control Act, as amended, 22 U.S.C. §§ 2751-2796c (1982), which authorizes the Department of Defense to enter into contracts for purposes of resale to foreign countries or international organizations. The Competition in Contracting Act of 1984 (CICA), which generally requires that agencies obtain full and open competition, exempts procurements in which the "written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures." 10 U.S.C. § 2304(c)(4) (Supp. III 1985). The Federal Acquisition Regulation (FAR) reiterates this exemption, and provides for its use in circumstances such as "[w]hen a contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written direction such as a Letter of Offer and Acceptance." 48 C.F.R. § 6.302-4(b)(1) (1986). The Department of Defense Supplement to the FAR (DFARS) further provides that "the contracting officer shall honor requests for sole-source prime and subcontracts from the FMS customer as specified in the Letter of Agreement or other written directive by the military sales organization." 48 C.F.R. § 225.7307(a) (1985).

Relying on this exemption from the requirement to obtain full and open competition, the Army awarded two sole-source contracts to Go-Power Corporation. In the purchase for resale to the Philippines, the Army orally solicited Go-Power on October 6, 1986, and in the purchase for resale to Egypt, the Army issued request for proposals (RFP) No. DAAA09-86-R-1301 to Go-Power on September 29, 1986. The agency waived the FAR requirement for notice of the proposed procurement actions in the Commerce Business Daily, 48 C.F.R. § 5.201, and awarded both contracts to Go-Power on October 24, 1986. The purchase for resale to the Philippines was for three dynamometers in the amount of \$81,178; the purchase for resale to Egypt was for four dynamometers in the amount of \$107,312.

The protester learned of the awards when they were reported in the Commerce Business Daily on November 5 and November 18, 1986, and protested to this Office on November 14 and

December 1. The agency advises us that the dynamometers have been delivered to the Philippines and are enroute to Egypt.

The primary issue in both procurements is whether the Army met the statutory and regulatory requirement for "written directions" of the foreign governments to justify the sole-source procurements. The written document relied upon by the Army in each case was a supplement to Department of Defense (DOD) Form 1513, "Letter of Offer and Acceptance." DOD Form 1513 provides for an offer by the United States government to sell defense articles or services to a foreign government and specifically lists the items and/or services, estimated costs, and the terms and conditions of sale; it provides for acceptance of the offer by signature of a representative of the foreign government. See DFARS, 48 C.F.R. § 225.7303(a). As noted above, the procurement regulations provide that a Letter of Offer and Acceptance constitutes "written directions" of a foreign government authorizing a sole-source procurement. FAR, 48 C.F.R. § 6.302-4. The execution of DOD Form 1513 by a foreign government does, in effect, constitute direction to contracting officials to procure in accord with its terms, and the foreign government may not provide additional direction regarding the source selection decision. DFARS, 48 C.F.R. § 225.7307(b).

The resale to Egypt was based upon a DOD Form 1513-1, "Amendment to Offer and Acceptance," specifying the Go-Power dynamometer. The amendment was signed by an Egyptian military official on May 11, 1984. According to the Army, Egypt requested the dynamometer when the original Form 1513 was executed in 1982, but the item was not then included because the Army did not have price and availability data. The Army formally sought to add the dynamometer in 1983, but used an incorrect stock number. The stock number was corrected by the Form 1513-1 upon which the protested procurement was based.

The purchase for resale to the Philippines was based upon a DOD Form 1513-2, "Notice of Modification of Offer and Acceptance." (Form 1513-2 states that it is to be used in lieu of Form 1513-1, which was used in the procurement for resale to Egypt, where the modification to the original Form 1513 is not a change in scope.) The modification revised the dynamometer description appearing in a DOD Form 1513 previously signed by the Philippines and the Army, which had referred to a generic fixed-based type of dynamometer, to refer specifically to a Go-Power semi-portable dynamometer. This form provided for an acknowledgment of receipt with the signature of a Philippine military official dated January 31, 1986. The reason stated on the modification form for the

change was to offer a replacement item due to the changed availability and anticipated unit cost increase for the originally-requested dynamometer.

The protester argues that the forms used by the Army in both procurements do not constitute an initiation by the foreign governments of written directions designating the Go-Power dynamometer as the sole source, i.e., to the exclusion of all others. Rather, the protester argues, the signatures of the foreign officials on the forms indicate only that the foreign governments accepted proposals by the United States. In the case of the procurement for resale to the Philippines, the protester maintains that the DOD Form 1513-2, along with other documents, indicates that the United States Army, rather than the Philippine government, first identified the Go-Power product. Specifically, the protester points to an internal Army communication, dated December 13, 1985, in which Army officials recommend the use of the Go-Power dynamometer. Similarly, the protester contends that the amendment to the Letter of Offer and Acceptance with Egypt represents the agency's selection of the Go-Power dynamometer, not a selection by the foreign government.

We believe that the documents relied on by the Army in both procurements comply with the requirement for "written directions" by the foreign governments. As previously discussed, the FAR specifically states that a Letter of Offer and Acceptance constitutes the required "written directions." The forms relied on here are simply additions to the original form for use in the case of amendment or modification. Like the basic Letter of Offer and Acceptance, such an addition must be executed by a representative of the foreign government.

We recognize that in some cases United States officials suggest the specifications or products listed in Letters of Offer and Acceptance. See Julie Research Laboratories, Inc.--Reconsideration, B-216312.2 et al., June 12, 1985, 85-1 CPD ¶ 672. However, neither CICA nor the applicable procurement regulations require that a foreign government initiate a sole-source designation or formulate it without any assistance from the United States. The statute and regulations simply state that there must be "written directions" of the foreign government for a particular source. Whether a United States agency initially recommends specific items or advises the foreign government as to what items might satisfy its needs is immaterial in the absence of evidence that the agency sought to have the foreign government request certain

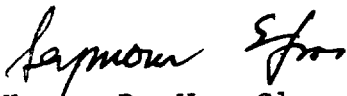
sources in bad faith or for the purpose of circumventing the requirement for competition. See Julie Research Laboratories, Inc., B-210435.2, Feb. 14, 1985, 85-1 CPD ¶ 196.

Here, there is no evidence in the record that the Army sought to have the foreign governments request the Go-Power dynamometer for the purpose of circumventing the requirement for competition. In the case of the procurement for resale to the Philippines, the cost of a fixed-base dynamometer listed in the original Letter of Offer and Acceptance had increased and was no longer available on an expedited basis. The Army apparently recommended substitution of the semi-portable Go-Power dynamometer to provide faster delivery, lower cost, and performance advantages. In an internal communication, Army officials requested that the Philippines be told about the cost increase of the originally offered item, and asked about the acceptability of the proposed replacement. They indicated that a DOD Form 1513-2 would be completed upon a decision by the Philippine government. Hence, the Army initially identified the Go-Power product and advised Philippine officials of its availability, but the decision ultimately was left to Philippine officials. In the case of the procurement for resale to Egypt, there is evidence that Egypt originally requested the Go-Power product in consultation with the United States Army, but the Army's role in the specific selection is not clear.

The protester further complains that the Army violated its own written internal procedures for foreign military sales. Procedures contained in the Department of Defense "Security Assistance Manual" provide for the submission of a Letter of Request (with no specific form or format) by the foreign country to convey its desire for a Letter of Offer and Acceptance from the United States government. DOD Security Assistance Management Manual 5105.38-M Ch.7, § I, C.1 (1984). The procedures also state that DOD should proceed with the development of a Letter of Offer and Acceptance upon receipt of the Letter of Request from the foreign country. DOD Manual 5105.38-M Ch.7, § II, C.1. The Army did not obtain a Letter of Request from the Philippines, but states that this was consistent with actual practice in many cases. The DOD Manual provides internal guidance for DOD personnel, and constitutes executive branch policy lacking the force and effect of law. Julie Research Laboratories, Inc.--Reconsideration, supra. Therefore, any failure by the Army to obtain a Letter of Request from the Philippines does not provide a valid basis for protest. See Timeplex, Inc. et al., B-197346 et al., Apr. 13, 1981, 81-1 CPD ¶ 280.

Finally, the protester argues that notice of the procurements should have been published in the Commerce Business Daily before award. The FAR provides that notice of a proposed contract action need not be published in the Commerce Business Daily when the contract action is "one for which the written direction of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government has the effect of requiring that the acquisition shall be from specified sources." FAR, 48 C.F.R. § 5.202(a)(3). This provision, which reflects the statutory exemption at 41 U.S.C. § 416(c)(2) (Supp. III 1985), was clearly applicable here.

The protests are denied.

for 
Harry R. Van Cleve
General Counsel